IN THE HUSTINGS COURT OF THE CITY OF PETERSBURG.

COMMONWEALTH *v.* CHAS. HALL DAVIS *et al.* (No. 2).

1. **Embezzlement—Indictments and Informations.**—No objection can be urged to an indictment for embezzlement because of the number of transactions contained in the indictment, as the statute allows this to be done.

2. **Criminal Law—Prosecution—Election between Counts.**—Under the terms and scope of our statute the court has no power such as that which exists in the federal courts, to reduce the number of offenses charged, or eliminate any of the counts employed, except as upon the trial it is of the opinion that there is no evidence or insufficient evidence to warrant a conviction upon certain counts, which may then be eliminated.

3. **Indictments and Informations—Misjoinder of Counts.**—Section 3994 of the Code, relating to indictments for embezzlement and larceny, warrants the prosecution of accessories, and the words "person accused" include an accessory.

4. **Embezzlement—Indictments and Informations—Sufficiency.**—It is sufficient for an indictment under § 3294 of the Code, for embezzlement, to conform to the language of the statute in its description of the offense. Possession need not be alleged, nor need larceny be charged. "Embezzle" has as fixed a meaning as "steal," and to charge that defendants "did feloneously * * * embezzle and convert to their use," etc., is a sufficient allegation.

OPINION.

J. M. MULLEN, J.: The defendants demur to and move to quash the indictment found against them for felony at the June Term, 1911, and assign the following grounds:

1. *Because, taken as a whole, it will be unintelligible to the jury.*

This indictment was drawn as provided by Sec. 3994 of the Code and charges 35 separate and distinct acts of embezzlement, covering the period from March 1st to August 17th, 1909. It contains 525 counts, each transaction being charged in 15 different forms.

If this objection is urged because of the number of transactions contained in the indictment, the answer is the statute permits this to be done. It declares that in a prosecution for embezzlement or fraudulent conversion, of bullion, money, etc., "it shall be lawful in the same indictment or accusation to charge and thereon to proceed against the accused for any number of distinct acts of such embezzlement or fraudulent conversion which may have been committed by him within six months from the first to the last of such acts."

Counsel cites Gardes *v.* U. S., 87 Fed. 175, and U. S. *v.* Cadwallader, 59 Fed. 679, as holding that the trial Court has discretion to require the prosecution, either before it has offered proof, or after it has closed its proof, to elect certain counts on which it will ask conviction, in all cases where the counts are of such character, and so numerous, that in the judgment of the Court submitting of proof on each, and the submitting of issue to the jury on each, would or might lead to confusion, or unduly embarrass the accused in making his defense. Such is the language of the Court in Gardes' Case, the Court basing the exercise of this discretion upon the language of the statute under which the prosecution was had.

But the terms and scope of our statute are so plain and broad, it leaves no room, in our judgment, for the exercise of such a power by the trial Court.

So, unless there is a misjoinder, the Court is powerless to reduce the number of offenses charged or eliminate any of the counts employed. If, however, upon the trial, the Court is of the opinion that there is no evidence, or not sufficient evidence, to warrant a conviction upon certain counts, these may be eliminated. Its function is to administer the laws, not make them.

2. *Because of misjoinder of counts,* in that,

(a) Sec. 3994 does not employ the word "use."

(b) Sec. 3994 does not employ the words "dispose of."

(c) Nor does it apply to accessories.

As seen from the reference already made to, and extract cited from, said statute (sec. 3994), it enlarges the common law rule as to indictments or accusations against persons accused of embezzling or fraudulently converting to their own use bullion, money, etc., in that it permits more than one distinct act of such embezzlement or fraudulent conversion to be charged in the same indictment. Its language is general, for the reason it does not create or define an offense, but merely prescribes the procedure for the prosecution of certain offenses already existing, namely, embezzlement or fraudulent conversion of bullion, money, etc. Embezzlement is a statutory offense, and was not known to the common law; so that, in order to ascertain what constitutes the offense, reference must be had to the statute creating it. While there are several sections of the Code treating of embezzlement, one only is applicable to this prosecution, and that is Sec. 3716. It declares: "If any person wrongfully and fraudulently *use, dispose of,* conceal or embezzle any money, * * *, he shall be deemed guilty of larceny." But whether the provisions of Sec. 3994 are sufficiently comprehensive to embrace of refer to all the expressions employed by Sec. 3716, it is needless to inquire, as the Commonwealth's Attorney has intimated his pur-

pose to ask leave to nolle prosequi all counts of the indictment under consideration in which the words "use" and "dispose of" occur.

It, therefore, only becomes necessary to inquire whether Sec. 3994 warrants the prosecution of accessories. It is urged that the words "person accused" has reference only to the principal in the commission of the offense within the purview of this statute. We do not so understand them. An accessory before the fact is equally guilty with the principal. 12 Cyc. 190, citing Minich *v.* People, 9 Pac. 4; State *v.* McGahill, 30 N. W. 553 and 33 N. W. 599; and People *v.* Mather, 21 Am. Dec. 122. Persons guilty of crime may be so as principals or as accessories, a principal being he who is the actor, or perpetrator, or is present aiding and abetting the fact to be done, and an accessory, who is not the chief actor, nor present at its commission, but is in some way concerned therein, either before or after the fact committed. All are offenders and all may be accused of and may be prosecuted and punished for the commission of the crime perpetrated. This is elementary law, the only distinction is that they must be indicted according to the nature of their participation.

Under a statute providing that all crimes, murder excepted, must be prosecuted within three years after the offense was committed, it was contended in People *v.* Mather, 21 Am. Dec. 121 (143), that the exception must be rigidly construed, and should be taken to include only the offense of principal to a murder, and not accessories before the fact. The Court held otherwise, declaring "Whatever is murder is included in it. If the crime of an accessory before the fact is not a murder, it is without a specific name. Homicide is a generic term, within which the offense of an accessory to a murder must fall."

"Some of our statutes, however, do not in terms refer to them (accessories before the fact) at all. Yet when a statute creates a felony, it comprehends and involves in the guilt of its commission accessories before the fact, though not mentioned, as it does principals in the second degree; and all statutes prescribing the punishment of felonies in like manner extend to such accessories, unless there be some express provision to the contrary." Davis Criminal Law, at page 42.

An accessory before the fact is punished as if he were the principal in the first degree, may be indicted either with the principal or separately, and may be indicted and tried at the same time with, or either before or after the principal in the first degree. Code, Secs. 3885, 3887; Hatchett's Case, 75 Va. 925.

3. *Because the counts of the indictment do not allege possession and do not state facts which constitute a charge of embezzlement, and are not sufficiently broad to cover a charge of larceny.*

As to the objection that the counts *are not sufficiently broad to cover a charge of larceny*, it is perhaps only necessary to say that they do not pretend to charge larceny, nor is this necessary. Leftwich's Case, 20 Gratt. 716.

It is true possession is not alleged, nor is that word to be found in the statute (Sec. 3716). In defining the offense, it specifies a series of acts, either of which separately or altogether may constitute an offense. One of these is where the alleged embezzlement is of money *"entrusted"* to the accused by another, or by any court, corporation or company. In this respect the counts conform to the requirements of the statute. "In an indictment for a statutory offense," says Moncure, J., in Young's Case, 15 Gratt., 664 (666), "It is generally proper and safest to describe the offense in the very terms used by the statute." And in Nax's Case, 13 Gratt, 789, (790), it was said: "Precedents are numerous in which very slight departures from the terms in which the offenses are described in the statutes have been held to vitiate the indictments."

These series of acts are stated in the disjunctive in the statute. Each act constitutes an offense under the statute, and may be charged separately or conjunctively in the same count. Morganstern's Case, 94 Va. 787.

But we apprehend the chief objection is that the counts do not state facts which constitute a charge of embezzlement; and, in this connection counsel for the defendants cite Boyd's Case, 77 Va. 52 (55). But the allegations of the counts do descend to particulars. They charge that the defendants, being then and there officers of the Appomattox Trust Company, a corporation, "did feloniously * * * embezzle and convert to their own use money, * * * the property of said Appomattox Trust Company, * * * then and there *entrusted* to them, * * * by virtue of their offices aforesaid, etc." The word "embezzle" has as fixed a meaning as the word "steal." If the charge had been "did steal, take and carry away," instead of "embezzle and convert to their own use," the sufficiency of the allegation could not be questioned.

The Commonwealth's Attorney, in the note of authorities submitted by him, cites forms given by Chitty and Bishop, and by the Supreme Court of California, Georgia and Massachusetts, and approved, none of which are more specific than that here under consideration. His citations are to 3 Chitty's Criminal Law, star paging 981; Bishop's Directions and Forms, Secs. 406, 407; 2 Bishop New Criminal Procedure, Secs. 338, 342; Bishop on Statutory Crimes, Sec. 425; People *v.* Garcia, 25 Cal., 531; Com. *v.* Tenny, 97 Mass. 57; and Chaffin *v.* State, 63 S. E. Rep. 230.

For the reasons herein set out, the Court is constrained to overrule the demurrer and motion to quash, etc.